

DWANE THOMPSON

IBLA 84-920

Decided July 9, 1985

Appeal from a decision of the Prineville, Oregon, District Office, Bureau of Land Management, rejecting right-of-way application OR 36953.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Applications -- Rights-of-Way: Federal Land Policy and Management Act of 1976

A Bureau of Land Management decision rejecting a right-of-way application for a road filed pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest.

APPEARANCES: Dwane Thompson, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Dwane Thompson has appealed from the August 22, 1984, decision of the Prineville, Oregon, District Office, Bureau of Land Management (BLM), rejecting his application for a residential access road across public land. Thompson is the owner of 40 acres of land described as the SE 1/4 SW 1/4, sec. 28, T. 16 S., R. 11 E., Willamette Meridian. At the time he purchased the land in 1978, there was no legal access to it.

The record reflects that over the years Thompson has tried various means to obtain access to his land. In April 1984 he filed right-of-way application OR 36953, pursuant to section 501(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a) (1982), seeking access across public lands in the SW 1/4 NW 1/4, N 1/2 SW 1/4, sec. 28, T. 16 S., R. 11 E. Following compilation of an Environmental Assessment/Land Report (EA/LR) and solicitation of comments from interested property owners, BLM rejected the application. 1/

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1/ The EA/LR at I.A. contains the following relevant background information:

"The right-of-way applied for would be approximately 2,600 feet in length and 30 feet wide and would serve for ingress and egress to the applicant's property in the SE 1/4 SW 1/4 of Section 28 and would have a proposed

As the rationale for rejection, BLM stated that approval of the right-of-way would not conform to its planning decision to keep rights-of-way along existing routes whenever possible to avoid the proliferation of separate rights-of-way. Further, BLM cited opposition to the right-of-way from the Oregon State Department of Fish and Wildlife and from adjoining landowners because the land to be crossed is within the boundary of the Tumalo deer winter range. Finally, BLM stated that alternative routes are available from the east which would be the shortest access route, would avoid the winter deer range, would not cross public land, and would be acceptable to adjoining landowners.

On appeal, appellant first argues that the EA/LR does not properly describe the access sought. The EA/LR states that the access would be a dirt road approximately 2,600 feet in length and 30 feet wide and would meander through existing Ponderosa pine trees. Appellant states: "What I have applied for is a 12' wide dirt road across a 1/2 mile of nearly flat land covered with sagebrush and laced with old logging skid roads. The first half of the road would displace some sagebrush; the second half would follow existing logging skid roads." We need only direct appellant's attention to his application, which describes the right-of-way sought as a "[r]oad 30' wide" which "will meander through any existing ponderosa to avoid cutting the pines." Apparently, appellant's argument on appeal is intended to indicate that the right-of-way which he actually seeks will have only a minimal impact. However, it is clear that BLM properly considered the right-of-way, as described by appellant in his application.

In its decision BLM acknowledged that an existing R.S. 2477 road across public land in the E 1/2 NE 1/4 of sec. 29, T. 16 S., R. 11 E., provides access for an adjoining property owner in the SW 1/4 SW 1/4, sec. 28. 2/ BLM

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fn. 1 (continued)

term of 30 years with the right of renewal. The proposed right-of-way is requested in lieu of right-of-way OR 36367 granted on December 5, 1983. The previous right-of-way was based upon public easement being accepted by Deschutes County as per letter dated September 19, 1983 (see Appendix B1). The public easement crossed lands owned by Philip Chase in the NW 1/4 NW 1/4 of Section 28 and was dedicated in 1975 to provide access to the SE 1/4 NW 1/4 of Section 28. Mr. Chase petitioned the county to vacate this easement and on January 15, 1984, the Deschutes County commissioners voted to hold a vacation hearing on the public easement. The vacating of this easement would leave Mr. Thompson without suitable access to his property and thus the current proposal was made. Should the proposed right-of-way be granted, Mr. Thompson proposes to relinquish the previous grant."

2/ Section 8 of the Act of July 26, 1866, 43 U.S.C. § 932 (1976) (repealed by section 706(a) of FLPMA, 90 Stat. 2793), otherwise known as R.S. § 2477, granted a right-of-way for the construction of highways over public lands. In Homer D. Meeds, 26 IBLA 281, 298, 83 I.D. 315, 323 (1976), the Board stated: "[T]his Department has considered State courts to be the proper forum to decide ultimately whether a public highway under 43 U.S.C. § 932 (1970) has been created under State law and to adjudicate the respective rights of interested parties."

then stated that "legal use of this private roadway would require a decision from the civil courts recognizing it as a public road." 3/

Appellant states that the above-quoted sentence suggests that he "might gain access over the private roadway through legal action." He continues:

On December 7, 1981, my attorney filed a petition under ORS [Oregon Revised Statutes] 376.150 for a Statutory Way of Necessity. Those proceedings culminated in the granting of a[n] easement with a 20% grade. As you know this is beyond standards (BLM Manual 9113.23). As you can see I have attempted legal action.

The way of necessity granted by Deschutes County commences at the southern end of the described R.S. § 2477 roadway, which is the northern boundary of the SW 1/4 SW 1/4 sec. 28, and extends eastward along that northern boundary into the SE 1/4 SW 1/4 owned by appellant. The record clearly indicates that this way of necessity is unsatisfactory due to the nature of the slopes to be crossed. (EA/LR at V.C.; EA/LR Appendix D at 4).

In response to BLM's statement regarding the policy to avoid proliferation of separate rights-of-way, appellant claims that if his present right-of-way application were approved, he would relinquish another right-of-way held by him (OR 36367) which is "only 1,300 to 2,600 feet from the right-of-way being applied for."

The other right-of-way referred to by appellant provides partial access to appellant's property. The status of appellant's access along a dedicated public easement and this right-of-way (OR 36367) is unclear from the record. The background for this access is set forth in the EA/LR, Appendix D-3, a memorandum dated May 14, 1984, from the county engineer to the Board of County Commissioners stating:

On May 23, 1975, Deschutes County entered into an easement agreement with Mr. and Mrs. Phillip Chase on the NW 1/4 of the NE 1/4 of Section 28, T 16 S, R 11 E W.M.. This agreement was made in consideration of the vacation of a public road located on the NE 1/4 of the NW 1/4 of said Section 28 which was also owned by the Chases. The agreement was made to provide access to the property lying southerly of the Chase property. At the time of the vacation and agreement, the 40 acre parcel lying southerly of the NE 1/4 of the NW 1/4 of Section 28 was shown in the ownership of the State of Oregon. However, it has recently been determined that the ownership is under the Bureau of Land Management and is part of the 160 acres owned by the BLM in Section 28.

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3/ This sentence is an apparent reference to the roadway as it continues onto the SW 1/4 SW 1/4, which is private land. Appellant was informed by the Prineville District Manager, BLM, in a letter dated Oct. 28, 1980:

"In order to meet your objective you would have to prove, through private litigation that the subject road is a public road where it crosses private lands.

"Since the locked gate is located on private land, the Bureau does not have jurisdiction to request the landowner to remove it."

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[After discovering that the way of necessity granted by the Board of Commissioners was inadequate, Thompson] then began to investigate other alternatives for access and found that the County had provided for the easement across the Chase property for future access to the public lands. He then negotiated for a right of way from BLM over their property to the point of access on the Chase property. Mr. Thompson also contacted the County regarding the status of this easement and was told that it could be utilized if the conditions of the agreement were met. The County then agreed to accept the offer of dedication outlined in the agreement of May 23, 1975 and so notified the BLM, the Chases and the Thompsons in the fall of 1983. Since that time, the Chases have asked that the Easement Agreement of May 23, 1975 be nullified.

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#### RECOMMENDATION:

It is the recommendation of the Department of Public Works that the County should accept the offer of dedication and not nullify the Easement Agreement of May 23, 1975.

Appellant apparently would prefer to have the right-of-way sought in this case, rather than the potential access discussed in the above-quoted memorandum, presumably because of the possibility for vacation of the dedicated public easement. See EA/LR at III.B.

Appellant complains, regarding BLM's concern for the Tumalo deer winter range, that OR 36367 only restricted the time of construction; the range encompasses more than 100 square miles; and substantial human impacts abound in that area including roads, housing, city parks, etc.

We assume appellant's position is that approval of his proposed right-of-way would not be detrimental to the deer range. Initially, we would point out that right-of-way OR 36367, as depicted in the record, does not cross the deer winter range, so conditions or lack of conditions on that right-of-way are not relevant to considerations involving the deer range. In addition, the fact that there presently exist within the range numerous human impacts does not weigh in favor of approval of this right-of-way; rather, it may be seen as supportive of BLM's position, since more access to the area has the potential for even greater pressures on the deer population.

Appellant attacks BLM's suggestion that alternative access routes exist from the east. Appellant claims that such routes would have to cross 2,600 feet of irrigated pasture. He emphatically states access does not exist. Appellant also speculates adjacent owners have conspired to prevent him from accessing his property.

Despite appellant's assertion that access from the east is unavailable, the record indicates otherwise. It is pointed out in the EA/LR at I.A.3 that

appellant could pursue, through further court action, under the Oregon way of necessity statute, road access from the east. Furthermore, certain letters from adjoining landowners, attached to the EA/LR, Appendix C at C-1, C-2, indicate that appellant was offered a constructed access from the east for \$ 10,000, but the offer was refused.

[1] Approval of a right-of-way by the Secretary under section 501 of FLPMA, 43 U.S.C. § 1761 (1982), is a wholly discretionary matter. William A. Sigman, 66 IBLA 53 (1982); Nelbro Packing Co., 63 IBLA 176 (1982). A BLM decision rejecting an application for a right-of-way will ordinarily be affirmed by the Board when the record shows the decision to be based on a reasoned analysis of the factors involved, made with due regard for the public interest. Nelbro Packing Co., *supra* at 185. Review of the record in this case reveals that the BLM decision represents a reasoned analysis of the factors involved and that BLM gave due regard to the public interest.

The record shows appellant purchased his property when no access was available. He provided information to BLM concerning use of the existing road across the E 1/4 NE 1/4 of sec. 29, such that BLM recognized the unimproved road on public land as a public highway pursuant to R.S. § 2477. That road, however, crossed private land before entering appellant's property. The adjoining private property owners prevented appellant from using their road.

Although appellant was apparently offered constructed access across private lands from the east at a cost of \$ 10,000, he refused the offer and sought a way of necessity under Oregon law. The way of necessity was granted, but the route proved to be unacceptable due to the nature of the slopes to be crossed. Appellant then sought and received right-of-way OR 36367 which, coupled with a public easement across private land, would provide access. However, the private property owner petitioned the county to vacate the public easement and because of the uncertainty surrounding the outcome of that proposal, appellant sought yet another right-of-way. In the absence of an affirmative showing that there is no possibility of access other than that sought in the application, appellant has failed to establish error in the BLM decision rejecting his application for right-of-way OR 36953.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris  
Administrative Judge

We concur:

Franklin D. Arness  
Administrative Judge

James L. Burski  
Administrative Judge

